

KENNETH H. BUNCH

IBLA 77-8

Decided October 27, 1978

Appeal from decision of Administrative Law Judge E. Kendall Clarke, reversing decision of Glennallen, Alaska, Resource Area Manager, Bureau of Land Management, and directing issuance of grazing leases (AA-8018, A-062485-A, Trespass 50-01-25).

Set aside and remanded.

1. Appeals—Secretary of the Interior

Under 43 CFR 4.1 the existence of a Secretarial policy limits review by the Board of Land Appeals to the question of whether the action under review is consistent with that policy.

2. Alaska: Alaska Native Claims Settlement Act—Alaska: Grazing—Alaska Native Claims Settlement Act: Withdrawals—Grazing Leases: Applications—Withdrawals and Reservations: Generally

Where a decision rejects an application for an Alaska grazing lease because of an asserted Secretarial policy against granting such applications for land withdrawn pursuant to sec. 17(d)(2) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1616(d)(2) (Supp. V, 1975), but the record on appeal is incomplete with respect to the existence of such policy, the record should be remanded for further documentation.

3. Alaska: Grazing—Applications and Entries: Generally—Grazing Leases: Applications

Neither an application for an Alaska grazing lease nor an application for assignment of a

grazing lease confer upon the applicant a right to a lease, the granting thereof being discretionary and subject to any changes in Secretarial policy.

4. Alaska: Grazing—Appeals: Grazing Leases: Applications—Rules of Practice:
Appeals: Generally—Trespass: Generally

The Board of Land Appeals will not exercise its de novo review authority to deny applications for Alaska grazing leases on the basis of trespass where (1) trespass was not cited as a reason for denial of the applications in the decision under appeal, (2) the record does not provide a clear basis for determining the applicant's responsibility for the trespass, and (3) there is no record of compliance with the procedures specified in 43 CFR 9239.0-9(b).

APPEARANCES: James R. Mothershead, Esq., Office of the Solicitor, Anchorage, Alaska, for Bureau of Land Management, Appellant; Denis R. Lazarus, Esq., Anchorage, Alaska, for Kenneth H. Bunch.

OPINION BY ADMINISTRATIVE JUDGE GOSS

This is an appeal by the United States from a decision of Administrative Law Judge E. Kendall Clarke after hearing on appeal from the December 19, 1974, decision of the Glennallen Resource Area Manager, Bureau of Land Management (BLM). The BLM decision denied Kenneth Bunch's application for grazing lease (AA-8018) and his application for partial assignment of a grazing lease (A-062485-A). Judge Clarke's decision remanded the matter to BLM with instructions to enter into leases not inconsistent with that decision.

Kenneth H. Bunch is a registered guide and outfitter in Glennallen, Alaska. These proceedings arise from his attempts to secure grazing rights for horses at Bryson Bar along the Chitina River, and at Big Bend Lakes several miles to the northwest.

Bunch had hunted in the Big Bend Lakes area for several years and rehabilitated part of an old cabin in 1968. In 1969, he built plywood frame cabins in the area. He testified that he had attempted to locate a headquarters site there, but BLM refused his filing because of the land freeze pending settlement of native claims. *See* PLO 4582, 34 FR 1025 (January 17, 1969). After 1969, he used the area to graze horses during the hunting season, at which time the cabins were also occupied. Ten horses on the land died in December 1970 because of severe winter conditions. On March 30, 1971, a notice of trespass was

issued with respect to the cabins. Bunch was not willing to remove the cabins and in February 1972, he gave them to his wife who had filed a notice of location of a mining claim on the site. By application dated March 28, 1972, Bunch applied for a grazing lease on the Big Bend Lakes Area, AA 8018.

It appears that Bunch's wife also located a mining claim on the Bryson Bar area. This area was included in grazing lease A-062485 held by Francis L. Pease, and by application dated March 29, 1972, Bunch applied for a partial assignment of this lease. Bunch claims that in a telephone conversation with a secretary in the Glennallen office, he was told (erroneously) that the assignment had been approved. Bunch began to use the area in 1972 and built a cabin in September of that year.

The Pease lease limited animal use from 18 to 30 horses and Pease was not willing to assign any of this use to Bunch; he only agreed to an assignment of the land at the Bryson Bar area.

In a separate action based on inspections made over a 3-year period, it was determined that Pease was only using a relatively small area of his lease, and by decision dated March 23, 1973, the Pease lease was reduced so that it no longer included the area sought by Bunch. Bunch had no notice of this action.

By decision dated May 2, 1974, (vacated May 21, 1974) the Area Manager denied both Bunch applications. The decision stated that the cabins and other physical improvements constitute an unsettled occupancy trespass which precludes issuance of the leases. The assignment of the Bryson Bar area in the Pease lease was denied on the additional basis of the lack of agreement with respect to horse use. Furthermore, the decision pointed out that the lands had been withdrawn under section 17(d)(2) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1616(d)(2) (Supp. V, 1975), which directs the Secretary to withdraw land suitable for addition to the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems. The decision stated that a policy prevented issuance of grazing leases in lands so withdrawn.

In his December 19, 1974, decision rejecting the applications, the decision which was appealed to Judge Clarke, the Area Manager made no reference to the trespass issue. Instead, he based his rejection of the applications on a "secretarial policy" which prevents issuance of leases on lands withdrawn under section 17(d)(2) of ANCSA. The rejection of the assignment application was further justified on the basis of Pease's unwillingness to assign horse use and the fact that the Pease lease had been reduced to exclude the area under application.

The Judge ruled that he lacked jurisdiction over the trespass matter and that the decision denying the applications was erroneous.

because the ANCSA withdrawals did not hinder BLM's discretion to issue grazing leases.

[1] It is not clear that the Judge gave proper weight to the Solicitor's statements that a Secretarial policy existed, which policy, if documented, would preclude the Area Manager from obeying Judge Clarke's order and issuing the leases. Indeed, the existence of such a Secretarial policy would preclude Judge Clarke from directing the Area Manager to perform any act inconsistent with such policy. 1/

The Board's review is likewise limited to ascertaining the Secretarial policy and determining whether the action under review is consistent with the policy. See Nola Grace Ptasynsky, 28 IBLA 256 (1976); L. A. Walstrom, Jr., 25 IBLA 186 (1976); Molybdenum Corporation of America, 12 IBLA 339 (1973); see also Wamer Bergman (On Reconsideration), 31 IBLA 21 (1977). As evidence of the departmental policy with respect to grazing leases on (d)(2) lands, we have been provided with several documents of which we take official notice. The first document is a memorandum from the Director, BLM, to the Alaska State Director, dated December 29, 1972. It makes no specific reference to grazing but states:

The general objective for interim administration is to avoid encumbrances and impacts on the land which might jeopardize (1) interests of the Native beneficiaries, or (2) the future commitment of the land to permanent Federal management. However, encumbrances may be allowed if they are necessary for the general welfare of the people of Alaska and in the general public interest.

The memorandum requires coordination with the Federal agencies involved in the withdrawal as well as the Joint Federal-State Land Use Commission. This letter is referred to as a "policy directive" in a letter dated July 6, 1973, from Jack O. Horton, Assistant Secretary, to Ted G. Bingham, Executive Director of the Commission. More recently, a Memorandum of Understanding between BLM and four systems agencies listed in section 17(d)(2) of ANCSA, revised, December 16, 1977, indicates the general policy of coordinating decisions on applications for land uses among those agencies mentioned in section 17(d)(2) of ANCSA. While none of these documents clearly precludes issuance of grazing leases on (d)(2) lands, no leases are to be issued unless the action is coordinated with the appropriate four systems agency.

1/ The documents submitted by the BLM at the hearing show that an explicit policy against issuance of new grazing leases on (d)(2) lands existed at the Bureau level, and there was no explanation in the record why such a policy was necessary. A Secretarial policy must, of course, be approved by a member of the secretariat.

[2] We note that the Alaska State Director had instructed that no grazing leases should include (d)(2) lands (Exh. 1). However, these instructions expired on December 31, 1973, and the record does not document a current policy which specifically precludes the issuance of a grazing lease on (d)(2) lands. If a decision rejecting a lease application is to be sustained on the basis of a policy, a copy of the document establishing the policy should be readily available so that it may be placed in the record. In this regard, the Administrative Procedure Act provides in 5 U.S.C. § 552(a)(2)(1970): "Each agency, in accordance with published rules, shall make available for public inspection and copying * * * (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register * * *." At 5 U.S.C. § 556(e), the Act states:

The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

[3] Neither an application for a grazing lease nor an application for assignment of a grazing lease confer on the applicant a right to a lease. See 43 CFR 4131.1-4 and 43 CFR 4131.2-7(c). Even if it were true that the application was rejected for inappropriate reasons, an applicant is not entitled to a lease if valid reasons for rejection exist. Because the granting of such applications is discretionary, the applications remain subject to any policy that may come into effect while they are pending. Accordingly, we remand this case to the District Office to ascertain the present policy of the Department with respect to grazing leases on (d)(2) lands, to adjudicate the subject applications pursuant to that policy, and to provide written evidence of that policy for the record.

As to Bunch's application for assignment of the Bryson Bar area from the Pease lease, Pease as assignor could assign no greater rights than he himself enjoys. Regardless of the actual carrying capacity of the lands under Pease's lease, the lease itself expressly limited the amount of horse use. While Bunch's application was pending, the Area Manager reduced the area of the Pease lease so that it no longer included the area sought by Bunch. Bunch was not notified of this action. In these circumstances, Bunch's application could have been treated as an application for a new lease, but it would appear the application would have been rejected for the same reasons given for rejection of the application for the lease for the Big Bend Lakes area. Accordingly, we remand the assignment application for adjudication as

an application for a new lease on the same basis as our remand of the application for the Big Bend Lakes area.

[4] The United States asserts that Judge Clarke erred in disavowing jurisdiction over the occupancy trespass matter and urges us to exercise de novo review and deny the applications on account of the trespass. However, we do not construe Judge Clarke's decision as disavowing this Department's substantive jurisdiction over the occupancy trespass. Although Bunch had received notices of trespass, the Area Manager's December 14, 1974, decision did not link those trespasses to the denial of Bunch's applications.

While evidence on the trespass was introduced by both sides at the hearing before Judge Clarke, 2/ we do not believe that we should exercise de novo review authority in this case. The record does not provide a clear basis for determining applicant's present responsibility for the cabins so that his applications may be denied on the basis of a continuing trespass. Although we recognize that there may be an unresolved occupancy trespass from 1969 to 1972 when the Big Bend Lakes cabins were admitted to be owned by Bunch, the record does not indicate that there has been a demand for payment or compliance with other procedures specified in 43 CFR 9239.0-9(b) which would justify a denial of a lease under that regulation. The Area Manager may take appropriate action on the trespass issue when acting on these applications on remand.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the cases remanded to the Glennallen Resource Area Manager for further action.

Joseph W. Goss
Administrative Judge

We concur.

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

2/ For a discussion of the Board's review authority, see generally *Ideal Basic Industries, Inc. v. Morton*, 542 F.2d 1364, 1367-68 (9th Cir. 1976).

